



February 24, 2006

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## ENGROSSED HOUSE BILL No. 1136

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DIGEST OF HB 1136 (Updated February 23, 2006 10:56 am - DI 106)

**Citations Affected:** IC 32-28.

**Synopsis:** Brokers' liens on commercial real estate. Allows a principal broker to assert a lien upon commercial real estate that is the subject of a purchase, a lease, or other conveyance to a buyer or tenant, in the amount that the principal broker is due for licensed services provided in connection with the transaction under certain conditions. Requires an owner to provide a principal broker with certain information concerning a closing transaction before the date of the closing transaction, and requires an owner to certify at closing that the owner has made the required disclosures or that the principal broker has been paid in full. Permits a party that has suffered a pecuniary loss as the result of an owner's noncompliance with the notice or certification requirements to bring a cause of action against the owner, and permits treble damages if the owner's noncompliance was fraudulent. Makes other changes.

**Effective:** July 1, 2006.

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**Burton, Austin, Ruppel, Woodruff**

(SENATE SPONSORS — LONG, SIMPSON)

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January 5, 2006, read first time and referred to Committee on Judiciary.

January 19, 2006, reassigned to Committee on Financial Institutions.

January 24, 2006, reported — Do Pass.

January 30, 2006, read second time, ordered engrossed.

January 31, 2006, engrossed.

February 1, 2006, read third time, passed. Yeas 97, nays 1.

SENATE ACTION

February 6, 2006, read first time and referred to Committee on Judiciary.

February 23, 2006, amended, reported favorably — Do Pass.

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EH 1136—LS 6654/DI 101+



February 24, 2006

Second Regular Session 114th General Assembly (2006)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type~~.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~this style type~~ reconciles conflicts between statutes enacted by the 2005 Regular Session of the General Assembly.

## ENGROSSED HOUSE BILL No. 1136

A BILL FOR AN ACT to amend the Indiana Code concerning property.

*Be it enacted by the General Assembly of the State of Indiana:*

1 SECTION 1. IC 32-28-12.5 IS ADDED TO THE INDIANA CODE  
2 AS A NEW CHAPTER TO READ AS FOLLOWS [EFFECTIVE  
3 JULY 1, 2006]:

4 **Chapter 12.5. Commercial Real Estate Broker Liens**

5 **Sec. 1. As used in this chapter, "commercial real estate" means**  
6 **any real estate other than:**

7 (1) real estate containing one (1) to four (4) residential units;

8 (2) real estate on which no buildings or structures are located  
9 and that is zoned for single family residential use; or

10 (3) single family residential units such as:

11 (A) condominiums;

12 (B) townhouses; or

13 (C) homes in a subdivision when sold, leased, or otherwise  
14 conveyed on a unit-by-unit basis, even if those units are  
15 part of a larger building or parcel or real estate containing  
16 more than four (4) residential units.

17 **Sec. 2. As used in this chapter, "fees or commissions" means**

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1 compensation owed to a principal broker for performing services  
2 requiring a license under IC 25-34.1-3-2.

3 Sec. 3. As used in this chapter, "principal broker" has the  
4 meaning set forth in IC 25-34.1-1-2.

5 Sec. 4. As used in this chapter, "real estate" has the meaning set  
6 forth in IC 25-34.1-1-2.

7 Sec. 5. A principal broker may have a lien upon commercial real  
8 estate, or any interest in commercial real estate, that is the subject  
9 of a purchase, a lease, or other conveyance to a buyer or tenant, in  
10 the amount that the principal broker is due for licensed services,  
11 including brokerage fees, consulting fees, and management fees due  
12 the principal broker under a written agreement, a contract, or  
13 another written instrument:

14 (1) signed by:

15 (A) the owner of an interest in the commercial real estate  
16 or by the owner's authorized agent; or

17 (B) a prospective buyer or prospective tenant, or by the  
18 buyer's or tenant's authorized agent; and

19 (2) entered into after June 30, 2006.

20 A lien under this chapter is available to the principal broker named  
21 in the written agreement, contract, or other written instrument  
22 signed by the owner, buyer, or tenant, or their respective agents,  
23 and not to an employee or independent contractor of the principal  
24 broker.

25 Sec. 6. (a) A lien under this chapter attaches to commercial real  
26 estate or an interest in commercial real estate upon:

27 (1) the principal broker being entitled to fees or commissions  
28 under a written agreement, a contract, or another instrument  
29 signed by the owner, buyer, or tenant of the commercial real  
30 estate, or by an authorized agent of the owner, buyer, or  
31 tenant; and

32 (2) except as provided in sections 8 and 9 of this chapter, the  
33 principal broker recording a notice of lien in the office of the  
34 recorder of the county in which the commercial real estate or  
35 an interest in the commercial real estate is located:

36 (A) before the recording of the deed for the actual  
37 conveyance or transfer of the commercial real estate  
38 against which the broker is claiming a lien, if the principal  
39 broker claims fees or commissions from the party  
40 conveying or transferring an interest in the commercial  
41 real estate; or

42 (B) not later than ninety (90) days after the recording of

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the deed or other instrument for the purchase or other conveyance or transfer of the commercial real estate, if the principal broker claims fees or commissions from the party receiving a conveyance or transfer of an interest in the commercial real estate.

(b) A lien under this chapter attaches on the date of the recording of the notice of the lien under subsection (a)(2) and does not relate back to the date of the written agreement, contract, or other written instrument described in subsection (a)(1).

Sec. 7. (a) This section does not apply:

- (1) to fees or commissions that arise from a lease, including fees or commissions for a sale of the property, lease expansions, or lease renewals;
- (2) if a principal broker's fees or commissions have been paid in full; or
- (3) if a principal broker waives the notice requirements of this section in writing.

(b) Not later than ten (10) days before the planned closing of a transaction involving the sale of commercial real estate, the owner shall notify the following persons of the date of the closing, the time of the closing, the address of the closing, and of the name of the closing agent, title company, or title insurance agent:

- (1) One (1) or more principal brokers to whom the owner owes fees or commissions.
- (2) The closing agent, title company, or title insurance agent involved in the transaction.

Notice under this subsection shall be sent by registered or certified mail, return receipt requested, or by another means of service authorized by the Indiana trial rules that provides proof that the addressee has received the notice.

(c) To exercise its rights under this chapter to file a lien after receipt of the notice under subsection (b), the principal broker must notify the closing agent, title company, or title insurance agent at the address in the notice of the amount of the fees or commissions owed before the time of the closing stated in the notice.

(d) If the principal broker does not attend the closing of a transaction involving the sale of commercial real estate, the owner shall certify in writing at the closing, under the penalties of perjury:

(1) that:

- (A) the owner has notified the principal broker in

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1 accordance with subsection (b); and

2 (B) the principal broker received the notice; or

3 (2) that the principal broker has been paid in full.

4 Sec. 8. (a) This section applies to a transaction involving the  
5 conveyance or transfer of commercial real estate in which:

6 (1) payment to a principal broker is due in installments; and

7 (2) a part of the installment payments is due only after the  
8 conveyance or transfer of the commercial real estate involved  
9 in the transaction.

10 (b) Subject to subsection (c), the principal broker may record a  
11 notice of lien for those payments described in subsection (a)(2) at  
12 any time after the transfer or conveyance, but not later than ninety  
13 (90) days after the date on which the payment is due. A notice of  
14 lien under this section is effective as a lien against the transferor's  
15 interest in the commercial real estate only to the extent  
16 consideration is still owed to the transferor by the transferee.  
17 However, the lien is effective against the transferee's interest in the  
18 commercial real estate without the limitation described in this  
19 subsection.

20 (c) A single claim for a lien recorded:

21 (1) before the transfer or conveyance of the commercial real  
22 estate; and

23 (2) with respect to all payments due in installments;

24 is valid and enforceable with respect to payments due after the  
25 transfer or conveyance. However, as payments or partial payments  
26 of fees or commissions are received by the principal broker, the  
27 principal broker shall, by providing partial releases with respect  
28 to those payments, reduce the amount due the principal broker  
29 under the notice of lien described in this subsection.

30 Sec. 9. (a) Subject to subsection (b), in the case of a lease of  
31 commercial real estate, including a sublease or an assignment of a  
32 lease, the notice of a lien under this chapter must be recorded not  
33 later than ninety (90) days after the tenant takes possession of the  
34 leased premises. However, if:

35 (1) the transferor personally serves, on the principal broker  
36 entitled to claim a lien, written notice of the intended  
37 execution of the lease; and

38 (2) the notice described in subdivision (1) is served not later  
39 than ten (10) days before the date of the intended execution of  
40 the lease;

41 the principal broker's notice of lien must be recorded before the  
42 date indicated in the notice described in subdivision (1) for the

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1 execution of the lease. The lien attaches on the recording of the  
 2 notice of lien and does not relate back to the date of the written  
 3 agreement, contract, or written instrument under which the  
 4 principal broker is entitled to fees or commissions.

5 (b) As used in this subsection, "future fees or commissions"  
 6 refers to fees or commissions:

7 (1) other than those fees or commissions due to a principal  
 8 broker upon the execution of a lease under subsection (a); and

9 (2) due to the principal broker upon the exercise of an option  
 10 to:

11 (A) expand the leased premises;

12 (B) renew or extend a lease; or

13 (C) purchase the commercial real estate;

14 under a written agreement, a contract, or another written  
 15 instrument signed by the owner or tenant of the commercial real  
 16 estate. The principal broker may record a notice of lien at any time  
 17 after execution of the lease or other written agreement, contract,  
 18 or written instrument that contains rights to future fees or  
 19 commissions, but in no case later than ninety (90) days after the  
 20 occurrence of a condition for which future fees or commissions are  
 21 claimed. Except as provided in section 13(b) of this chapter, an  
 22 action to foreclose a lien to collect future fees or commissions must  
 23 be commenced not later than two (2) years after the recording of  
 24 the notice of the lien.

25 (c) If:

26 (1) commercial real estate is sold or otherwise conveyed  
 27 before the date on which future fees or commissions are due;  
 28 and

29 (2) the principal broker has recorded a valid notice of lien  
 30 before the sale or other conveyance of the commercial real  
 31 estate;

32 the purchaser or transferee is considered to have notice of and  
 33 takes title to the commercial real estate subject to the notice of lien.  
 34 However, if a principal broker claiming future fees or commissions  
 35 fails to record a notice of lien for the future fees or commissions  
 36 before the recording of a deed conveying legal title to the  
 37 commercial real estate to the purchaser or transferee, the principal  
 38 broker may not claim a lien on the commercial real estate. This  
 39 subsection does not limit or otherwise affect claims or defenses a  
 40 principal broker or owner or any other party may have in law or  
 41 equity.

42 Sec. 10. A principal broker shall, not later than ten (10) days

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after recording a notice of lien under this chapter, personally serve or mail, by registered or certified mail, a copy of the notice of lien to the owner of record of the commercial real estate, or to the agent of the owner of record, at the address of the owner stated in the written agreement, contract, or other written instrument on which the claim for the lien is based. If the address of the owner or the owner's agent is not stated, the principal broker shall personally serve or mail, by registered or certified mail, a copy of the notice of the lien to the address where real estate taxes are sent for the commercial real estate on which the claim of lien is based. Mailing of the copy of the notice of lien is effective when deposited in the United States mail with postage prepaid. Personal service of the notice of the lien is effective upon receipt by the owner or the agent of the owner of record. A principal broker's lien is unenforceable if mailing or service of the copy of notice of lien does not occur at the time and in the manner required by this section.

Sec. 11. (a) The principal broker claiming the lien shall, not later than one (1) year after recording the notice of the lien, commence proceedings to foreclose the lien. A principal broker's failure to commence proceedings within the time prescribed by this subsection extinguishes the lien and a subsequent notice of lien may not be given for the same claim, nor may that claim be asserted in any other proceedings under this chapter.

(b) A principal broker claiming a lien based upon an option or other right to purchase or lease commercial real estate shall, not later than one (1) year after recording the notice of the lien, commence proceedings to foreclose the lien. A principal broker's failure to commence proceedings within the time prescribed by this subsection extinguishes the lien and a subsequent notice of lien may not be given for the same claim, nor may that claim be asserted in any other proceedings under this chapter.

(c) The foreclosure of a lien recorded under this chapter shall be conducted under the same rules and same procedures applicable to the foreclosure of mortgages upon real estate. A complaint under this section must contain:

- (1) a brief statement of the written agreement, contract, or other written instrument that is the basis for the lien;
- (2) the date when the written agreement, contract, or other written instrument was made;
- (3) a description of the services performed by the principal broker;
- (4) the amount due and unpaid for the services described in

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subdivision (3);

(5) a description of the commercial real estate subject to the notice of lien; and

(6) other facts reasonably necessary to describe the rights of the parties.

**Sec. 12. A notice of lien recorded under this chapter must:**

(1) state:

(A) the name of the claimant;

(B) the name of the owner of the commercial real estate upon which the lien is claimed;

(C) a legal description of the commercial real estate upon which the lien is claimed;

(D) the amount for which the lien is claimed; and

(E) the license number of the principal broker's license under IC 25-34.1;

(2) contain a statement that the information contained in the notice is true and accurate to the knowledge of the signatory;

(3) be signed by the principal broker or by a person authorized to sign on behalf of the principal broker; and

(4) be verified.

**Sec. 13. (a) If:**

(1) a notice of lien has been recorded with the office of the recorder of the appropriate county; and

(2) a condition occurs that would preclude the principal broker from receiving fees or commissions under the terms of the written agreement, contract, or other written instrument upon which the lien is based;

the principal broker shall provide to the owner of record of the commercial real estate, not later than ten (10) days after written demand by the owner of record, a written release or satisfaction of the notice of lien.

**(b) Upon written demand:**

(1) served by the owner, buyer, or tenant described in section 5 of this chapter, or the authorized agent of the owner, buyer, or tenant described in section 5 of this chapter, on the principal broker claiming a lien under this chapter; and

(2) requiring the principal broker to:

(A) bring a suit to enforce the lien; or

(B) file an answer in a pending suit;

the principal broker shall bring a suit or file an answer not later than thirty (30) days after service of the demand. If the principal broker does not bring a suit or file an answer within the time

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prescribed by this subsection, the lien is extinguished. The service of a written demand under this subsection may be made by registered or certified mail, return receipt requested, or by personal service.

(c) If:

(1) a notice of lien under this chapter has been filed with the office of the recorder and the fees or commissions upon which the lien is based have been paid to the principal broker claiming the lien; or

(2) the principal broker fails to institute a suit to enforce the lien within the time prescribed by this chapter;

the principal broker shall, not later than five (5) days after receipt of a written demand from the owner, buyer, or tenant described in section 5 of this chapter for a release or an acknowledgment of satisfaction of the lien, acknowledge satisfaction or release of the lien in writing.

Sec. 14. If the principal broker and the party from whom fees or commissions are claimed under this chapter agree to alternative dispute resolution, any claim under this chapter must be heard and resolved in the forum agreed to by the parties. The court before which a lien foreclosure proceeding is brought under this chapter retains jurisdiction to enter judgment on the award or other result made or reached under alternative dispute resolution proceedings with respect to all parties to the foreclosure. The principal broker's notice of lien remains of record and the foreclosure proceeding shall be stayed during the pendency of the alternative dispute resolution proceedings.

Sec. 15. The cost of proceedings brought under this chapter, including reasonable attorney's fees, costs, and prejudgment interest due to the prevailing party, shall be borne by the nonprevailing party. If more than one (1) party is responsible for costs, fees, and prejudgment interest, the costs, fees, and prejudgment interest shall be equitably apportioned by the court or alternative dispute resolution tribunal among the responsible parties.

Sec. 16. Except for a waiver or release of a lien provided in consideration of payment of the fees or commissions claimed by a principal broker under this chapter, or except as otherwise provided in section 13 of this chapter, any waiver of a principal broker's right to a lien on commercial property under this chapter is void.

Sec. 17. Valid recorded liens, mortgages, and other

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encumbrances that are recorded before a principal broker's notice of lien under this chapter have priority over a principal broker's lien under this chapter. Prior recorded liens, mortgages, and encumbrances that have priority under this section include:

- (1) a valid mechanic's lien that is recorded after a principal broker's notice of lien under this chapter, but that relates back to a date before the recording date of the principal broker's notice of lien; and
- (2) prior recorded liens securing revolving credit and future advances of construction loans.

**Sec. 18. If:**

- (1) a claim for a lien under this chapter has been filed with the office of the recorder of the county in which commercial real estate or any interest in commercial real estate is located; and
- (2) an escrow account is established among:
  - (A) the one (1) or more parties allegedly responsible for payment of the fees or commissions on which the lien is based;
  - (B) the principal broker that filed the lien; and
  - (C) an independent third party as escrowee;
 from the proceeds of the conveyance, or from any other source of funds, in an amount that is at least one hundred ten percent (110%) of the amount of the lien claimed under this chapter;

the lien against the real estate is extinguished and becomes a lien on the funds contained in the escrow account. The establishment of an escrow account described in this section does not constitute cause for any party to refuse to close the transaction.

**Sec. 19. (a)** If any party, including a principal broker, buyer, or buyer's mortgagee suffers a pecuniary loss as the result of an owner's violation of the notice or certification provisions described in section 7 of this chapter, the party may bring a civil action against the owner for the following:

- (1) Actual damages.
- (2) The costs of the action.
- (3) Reasonable attorney's fees.

However, if the party establishes that the owner's violation of the notice or certification provisions was fraudulent, a court may award the party damages that do not exceed three (3) times actual damages.

(b) It is a defense to an action brought under this section that the most recent address provided by the principal broker to the

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1 owner in the agreement, contract, or other written instrument,  
2 including a written instrument described in section 5 of this  
3 chapter, was incorrect, and as a result of the incorrect address, the  
4 principal broker did not receive the owner's notice described in  
5 section 7(b) of this chapter, and as a result the principal broker  
6 failed to provide the notice as required in section 7(c) of this  
7 chapter.

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## COMMITTEE REPORT

Mr. Speaker: Your Committee on Financial Institutions, to which was referred House Bill 1136, has had the same under consideration and begs leave to report the same back to the House with the recommendation that said bill do pass.

WOODRUFF, Chair

Committee Vote: yeas 8, nays 0.

## COMMITTEE REPORT

Madam President: The Senate Committee on Judiciary, to which was referred House Bill No. 1136, has had the same under consideration and begs leave to report the same back to the Senate with the recommendation that said bill be AMENDED as follows:

Page 2, line 32, delete "7 and".

Page 2, line 32, after "8" insert "**and 9**".

Page 3, line 10, after "Sec. 7." insert "**(a) This section does not apply:**

**(1) to fees or commissions that arise from a lease, including fees or commissions for a sale of the property, lease expansions, or lease renewals;**

**(2) if a principal broker's fees or commissions have been paid in full; or**

**(3) if a principal broker waives the notice requirements of this section in writing.**

**(b) Not later than ten (10) days before the planned closing of a transaction involving the sale of commercial real estate, the owner shall notify the following persons of the date of the closing, the time of the closing, the address of the closing, and of the name of the closing agent, title company, or title insurance agent:**

**(1) One (1) or more principal brokers to whom the owner owes fees or commissions.**

**(2) The closing agent, title company, or title insurance agent involved in the transaction.**

**Notice under this subsection shall be sent by registered or certified mail, return receipt requested, or by another means of service authorized by the Indiana trial rules that provides proof that the addressee has received the notice.**

**(c) To exercise its rights under this chapter to file a lien after**

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receipt of the notice under subsection (b), the principal broker must notify the closing agent, title company, or title insurance agent at the address in the notice of the amount of the fees or commissions owed before the time of the closing stated in the notice.

(d) If the principal broker does not attend the closing of a transaction involving the sale of commercial real estate, the owner shall certify in writing at the closing, under the penalties of perjury:

(1) that:

(A) the owner has notified the principal broker in accordance with subsection (b); and

(B) the principal broker received the notice; or

(2) that the principal broker has been paid in full.

Sec. 8."

Page 3, line 36, delete "8" and insert "9".

Page 4, line 27, delete "12(b)" and insert "13(b)".

Page 5, line 6, delete "9" and insert "10".

Page 5, line 23, delete "10" and insert "11".

Page 5, line 23, delete "A principal broker may bring suit to enforce a lien".

Page 5, delete lines 24 through 26.

Page 5, line 27, delete "required by this chapter".

Page 5, line 28, delete "two (2) years" and insert "one (1) year".

Page 5, line 29, delete "under this section by filing a" and insert "to foreclose the lien".

Page 5, line 30, delete "complaint".

Page 5, line 37, delete "two (2) years" and insert "one (1) year".

Page 5, line 38, delete "by filing a complaint" and insert "to foreclose the lien".

Page 6, line 1, after "(c)" insert "The foreclosure of a lien recorded under this chapter shall be conducted under the same rules and same procedures applicable to the foreclosure of mortgages upon real estate".

Page 6, delete lines 14 through 29.

Page 6, line 30, delete "11" and insert "12".

Page 7, line 3, delete "12" and insert "13".

Page 7, line 41, delete "13" and insert "14".

Page 8, line 10, delete "14" and insert "15".

Page 8, line 18, delete "15" and insert "16".

Page 8, line 21, delete "12" and insert "13".

Page 8, line 24, delete "16" and insert "17".

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Page 8, line 35, delete "17" and insert "18".

Page 9, after line 10, begin a new paragraph and insert:

**"Sec. 19. (a) If any party, including a principal broker, buyer, or buyer's mortgagee suffers a pecuniary loss as the result of an owner's violation of the notice or certification provisions described in section 7 of this chapter, the party may bring a civil action against the owner for the following:**

- (1) Actual damages.**
- (2) The costs of the action.**
- (3) Reasonable attorney's fees.**

**However, if the party establishes that the owner's violation of the notice or certification provisions was fraudulent, a court may award the party damages that do not exceed three (3) times actual damages.**

**(b) It is a defense to an action brought under this section that the most recent address provided by the principal broker to the owner in the agreement, contract, or other written instrument, including a written instrument described in section 5 of this chapter, was incorrect, and as a result of the incorrect address, the principal broker did not receive the owner's notice described in section 7(b) of this chapter, and as a result the principal broker failed to provide the notice as required in section 7(c) of this chapter."**

and when so amended that said bill do pass.

(Reference is to HB 1136 as printed January 25, 2006.)

BRAY, Chairperson

Committee Vote: Yeas 8, Nays 1.

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